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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 28.

HERTHA J. SIBBACH,

Petitioner,

vs.

WILSON & COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF WILLIAM D. MITCHELL, AMICUS CURIAE.

WILLIAM D. MITCHELL,
Amicus Curiae.

November, 1940.

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Question Presented.

This case involves the validity of Rules 35 and 37 of the Rules of Civil Procedure for the District Courts of the United States, Rule 35 providing that where the physical condition of a party is in controversy the court may require him to submit to a physical examination, and Rule 37 prescribing the consequences of failure to comply with the order.

The question is whether these rules deal with matters of practice and procedure, and are within the power of this Court to promulgate, or whether they attempt to prescribe substantive law, or alter substantive rights and are therefore void.

Statement.

This action was commenced in the District Court of the United States for the Northern District of Illinois, Eastern Division, to recover damages for personal injuries to the petitioner, a plaintiff below. She alleged in the complaint that she had suffered severe bodily injuries.

The respondent (defendant below) filed an answer denying these allegations. The defendant then filed a motion for an order requiring the plaintiff to submit to a physical examination by a physician or physicians to be appointed by the court to determine the exact nature and extent of the injuries in controversy, and the court ordered the plaintiff to submit to a physical examination by a physician appointed by the court, to be conducted at his office.

The plaintiff having refused to submit to such an examination, the defendant obtained from the court an order to show cause why she should not be punished for contempt for disobedience of the order. The plaintiff, in response to the order to show cause, appeared and contended that the court was without power to require her to submit to a physical examination, and that the order to that effect was void. The court thereupon made an order adjudging the plaintiff guilty of contempt because of her disobedience of the order for a physical examination, and directed that she be committed to jail until she complies with that order, or until she is otherwise legally discharged from custody.

From the order committing her for contempt, plaintiff appealed to the Circuit Court of Appeals, which upheld the validity of the rules of civil procedure providing for physical examination of parties and affirmed the judgment, whereupon she sought and obtained a writ of *certiorari* from this Court.

At no time in the course of the litigation either in the District Court or the Circuit Court of Appeals, or in the petition for *certiorari* in this Court, has the petitioner claimed that commitment for contempt, to enforce an order for a physical examination, is not authorized by the rules of civil procedure.

The point has not been made the subject of an assignment of error in this Court.

So far as the record shows, it seems to have been assumed by the parties and by the courts below that physical coercion of the petitioner by imprisonment for contempt is provided for in the rules.

Statutes and Rules Involved.

The Act of June 19, 1934, authorizing this Court to prescribe rules of practice and procedure for civil actions in the District Courts, is as follows:

> "Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.
>
> Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules

the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. [Act of June 19, 1934, c. 651, §§1, 2 (48 Stat. 1064), U. S. C., Title 28, §§723b, 723c.]"

The Rules of Civil Procedure in question are as follows:

"RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

(a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

Subdivision (b) of this rule relates to exchange of medical reports between the parties and is not material.

"RULE 37. REFUSAL TO MAKE DISCOVERY: CONSEQUENCES.

(a) Refusal to Answer. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned,

as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) Failure to Comply With Order.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a)

of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for

disobeying any of such orders *except an order to submit to a physical or mental examination.*" (Italics supplied.)

Subdivisions (c), (d), (e) and (f) of this rule are not material here.

Summary of Argument.

I. The question as to the validity of the rules should not be determined on the assumption that they authorize any physical coercion by imprisonment or otherwise to enforce an order for physical examination. They expressly prohibit resort to such means.

II. The rules, properly construed, are procedural, do not alter the substantive law and are valid.

By the Enabling Act of 1934 the Congress intended to confer upon the Court all the power respecting rules that it could constitutionally confer.

Union Pacific Railway Company v. *Botsford*, 141 U. S. 250; *Camden & Suburban Railway* v. *Stetson*, 177 U. S. 172, do not require the conclusion that Rules 35 and 37 prescribe rules of substantive law.

III. The disposition to be made of this case should be such as to make it clear that this Court is not approving the use of contempt proceedings to enforce obedience, but as error has not been assigned to that method of enforcement, there is no reason to reverse on that ground without passing on the question raised by the petition for *certiorari* as to the validity of the rules.

Argument.

I.

The question as to the validity of the rules should not be determined on the assumption that they authorize any physical coercion by imprisonment or otherwise to enforce an order for physical examination. They expressly prohibit resort to such means.

Before deciding whether a rule infringes substantive rights or is a procedural regulation, it is important to know what the rule prescribes and how it operates.

The parties and both courts below have dealt with this case on the assumption that obedience to an order for physical examination may be coerced by arrest and imprisonment for contempt.

The rules expressly prohibit such coercive methods.

Rule 35 merely authorizes an order for examination and is silent as to the consequences of disobedience. Rule 37 prescribes those consequences. It applies to all refusals to make discovery. It includes not only refusals to answer interrogatories or to give testimony or to answer questions, to produce documents for inspection, to permit entry upon land or other property, but also refusal to submit to a physical or mental examination. Subdivision (a) of Rule 37 makes no provision respecting refusal to submit to a physical examination. Subdivision (b)(1) provides for treating as a contempt of court refusal to answer questions after being directed so to do but has no application to orders for physical examination. Subdivision (b)(2) of Rule 37 deals generally with "other consequences" of refusals to answer, to produce or to submit to physical examination. It pro-

vides that in any of such cases "the court may make such orders in regard to the refusal as are just, and among others the following:". Paragraphs (i), (ii) and (iii) provide that in case of such refusals the issue of fact shall be taken as determined against the person refusing, or the disobedient party may be prohibited from offering evidence on the point or from introducing evidence of physical or mental condition, or his pleadings may be stricken out or proceedings stayed until the order is obeyed, or the action may be dismissed or judgment rendered by default against the disobedient party. So far there is no authority for contempt proceedings, except for refusal to answer a question when directed so to do by the court.

As a consequence of disobedience paragraph (iv) provides:

> "In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders *except an order to submit to a physical or mental examination.*" (Italics supplied.)

We thus find there is no express provision anywhere in the rule for contempt proceedings directed at a party who refuses to obey an order for physical examination. Although the provision in subdivision (b)(2) describing "other consequences" states that "the court may make such orders in regard to the refusal as are just", and, taken alone, it would be subject to the claim that it impliedly authorizes contempt proceedings for disobedience of an order for physical examination, we find in that same subdivision, in paragraph (iv) providing for the arrest of

any party disobeying any of such orders, the express exception that the coercive method of arrest shall not be used in the case of an order to submit to a physical or mental examination.

It is plain from the terms of the rule that for disobedience of an order for physical examination there is no "compulsory stripping and exposure" of a person, nor any physical coercion by arrest or commitment for contempt, and the party against whom an order for examination is made is left free to refuse, and the consequences which follow such refusal are to have the fact taken against him or to be prohibited from introducing evidence on the point or to have the proceedings stayed until the order is obeyed, or finally the dismissal of his action or the rendering of a judgment by default.

If more were needed to support this interpretation of the rule, it will be found in the record of the proceedings of the Advisory Committee, and the facts stated below are all taken from that record.

The first tentative draft of the rules respecting physical and mental examination of persons was submitted to the Advisory Committee in November, 1935. A copy of that draft is found in the appendix to this brief at page 27. It provided that physical examination could be ordered not only of a party to the action, but of persons not parties, and a tentative draft of what was then Rule 65 was also submitted, a full copy of which is found at page 27 of the appendix to this brief. The draft expressly provided that on refusal to obey an order for physical or mental examination, the person refusing, whether or not a party to the action, was subject to arrest and punishment for contempt.

Extracts from the reporter's transcript of the proceedings of the Committee on the consideration of this preliminary draft are set forth in the appendix hereto at page 28.

That transcript discloses that members of the Advisory Committee immediately raised doubts as to whether forcible means could be used to compel either a party, or person not a party, to submit to a physical examination.

The conclusions of the Advisory Committee were expressed in the statement of the chairman to the draftsman at the conclusion of the discussion, as follows:

> "You understand that we agreed that the penalty for failure to comply with an order for physical examination should not be contempt?
>
> Mr. Sunderland. Should not be contempt—yes."

Having determined that physical coercion should not be used to enforce an order for such examination, the Committee likewise struck out the provision that orders for physical examination could be directed at persons not parties because the methods prescribed for enforcement against a party, such as having the fact taken against him or his suit dismissed, were not available in the case of a person not a party.

At a subsequent meeting of the Advisory Committee early in 1936, Mr. Sunderland, produced a revised draft dealing, among other things, with the consequences of refusal to obey an order for physical examination. That tentative draft is set forth at length in the appendix hereto at page 36. After providing for various consequences of refusal, such

as having the fact taken against him, or having his suit dismissed or postponed. the draft wound up with the following provision:

> "and (9) the court may, in lieu of any of the foregoing orders, or in addition thereto, order the arrest of any party or agent of a party for disobeying any of such orders *except an order to submit to a physical or mental examination.*" (Italics supplied.)

That tentative draft, after further revision, is embodied in what is now Rule 37.

The principal purpose of this brief is to make sure that in passing upon the validity of these rules the attention of the Court is directed to the fact that they expressly prohibit any physical coercion of any kind for enforcement of an order for physical examination, and that the consequences of disobedience of such an order, being a refusal of the party involved to aid the court in ascertaining the facts, are limited to having the fact taken against the recalcitrant party or to having his case postponed, or, in proper situations, finally dismissed, or to having judgment entered by default.

II.

The rules, properly construed, are procedural, do not alter the substantive law and are valid.

The briefs of the parties ably deal with this proposition, but it is not out of place here to emphasize some of the controlling arguments.

The one respect in which the system of court-made rules is vulnerable, lies in the necessity for regarding the distinction between procedure and substantive

law. If the Court now adopts a narrow view as to what is procedural, not only the rules here in question but many others will fall. So much confusion will follow that the result may be to force an abandonment of the system and a return to legislative codes of procedure, where the distinction between procedure and substantive law is unimportant.

1. BY THE ENABLING ACT OF 1934 THE CONGRESS INTENDED TO CONFER UPON THE COURT ALL THE POWER RESPECTING RULES THAT IT COULD CONSTITUTIONALLY CONFER.

In this case the cause of action arose in Indiana and the substantive law of that State is to be applied. The action was brought in Illinois. The law of Indiana provides for physical examination of parties. The Illinois law does not. In order to invoke the Illinois law (the law of the forum) the petitioner asserts (p. 54, Petitioner's Brief on Petition for Certiorari):

> "Thus, no matter how an order for a compulsory physical examination may be classified in determining whether or not it modifies the substantive rights of a litigant, it is clear that it is classified as a rule of procedure within the rule that the law of the forum governs procedure. The law of Indiana has no bearing on the validity of the order involved in the instant case."

To supplement this contention petitioner asserts that the enabling Act of 1934 did not confer power to make all procedural rules, and that the all-inclusive provision that this Court may prescribe "practice and procedure" is limited by the provision that the rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant". The argument is that

although a rule is truly procedural and does not change the substantive law, it does not follow that the Court may promulgate it, for otherwise the prohibition of rules affecting substantive rights would be surplusage. The author of this brief is quoted (Petitioner's Brief, p. 28) as saying at the Cleveland Institute Proceedings, page 182, that the clause about substantive rights is surplusage. The statement then made was as follows:

> "This statute provides that the rules shall relate to pleading practice and procedure, and that they shall not affect substantive rights, of the litigant. That last phrase is probably surplusage. If it had said 'pleading practice and procedure' and stopped there, that would have excluded substantive rights, and furthermore constitutional limitations would have prevented the Congress, even if it had tried, from delegating to the courts power to make rules of substantive law.
>
> This problem at first approach seems difficult. The Advisory Committee found very little difficulty with it. It is astonishing how many decisions there are in the Supreme Court and other courts which define the differences between procedure, on the one hand, and substantive rights on the other. There are some problems that have arisen under these rules and continue to be present, but they are very few in number."

There is no reason to change that statement.

Section 2 of the Enabling Act, dealing with union of law and equity procedure, states:

> *"Provided, however,* That in such union of rules the right of trial by jury as at common law

and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate."

No one would claim that this proviso is not surplusage. It is a mere reminder that under the Constitution no rule could impair the right to a jury trial, just as the limitation in Section 1 is a reminder that under the Constitution the Congress may not delegate to the courts the power to change the substantive law.

Anyone familiar with legislative practice knows that to forestall objections or amendments, unnecessary provisions often are inserted which make no change in the effect of the law.

To sustain the view that the enabling act does not authorize this Court to prescribe all rules of practice and procedure, but only those which do not "affect" substantive rights, would result in hopeless difficulty in testing the validity of rules.

What is a rule of practice or procedure which affects substantive rights? How define the difference between a rule of practice or procedure which "affects" substantive rights and one which does not?

There is hardly a rule of practice or procedure in the new Federal Rules which does not to some extent affect the enforcement of substantive rights. The rule requiring a defendant to answer in twenty days, and on his failure to do so, allows judgment against him by default and without proof, is a rule of practice or procedure. Yet failure to comply may result in complete loss by defendant of substantive rights.

The contention that the enabling act forbids *rules of practice or procedure* which affect substantive rights must be rejected.

Again it is suggested in the briefs that if the enabling act does not ban all rules of *practice or pro-*

cedure which affect substantive rights, it at least forbids rules of practice or procedure which affect "important" rights, and that although the rules here in question do deal with procedural matters, the Congress did not intend to allow this Court to promulgate rules of practice or procedure involving "broad and important questions of policy".

Such a conclusion would require the courts to examine each rule of practice and procedure and determine whether or not it deals with matters involving broad and important questions of policy.

Such an interpretation of the enabling act is inadmissible. The provision respecting rules altering the substantive rights of litigants should not be so construed.

The Act of 1934 leaves to this Court full power to make rules of practice and procedure, without regard to what had been the previous practice established by statute. The expressed limitations as to altering substantive rights and denying a right to jury trial add or subtract nothing. This power left with this Court is subject only to the limitation that the united rules shall not be effective until the Congress has had a look at them with opportunity to reject them if it finds that they are objectionable for reasons of public policy or on any other grounds.

The ultimate question is whether Congress, is prevented by the Constitution from leaving to the Court the power to prescribe Rules 35 and 37.

Substantive law fixes the rights of parties on a given state of facts. Practice and procedure include the steps which may be taken by a court to ascertain the facts on which the rights of the parties depend. The decisions, both State and Federal, cited in the other briefs, make it clear that a rule requiring a

party whose physical condition is in controversy to submit to a physical examination, under suitable conditions, on pain of having the fact taken against him or losing his case if he refuses thus to aid the court in ascertaining the truth,—is a matter of procedure and not of substantive law.

2. *Union Pacific Railway Company* v. *Botsford*, 141 U. S. 250; *Camden & Suburban Railway* v. *Stetson*, 177 U. S. 172, DO NOT REQUIRE THE CONCLUSION THAT RULES 35 AND 37 PRESCRIBE RULES OF SUBSTANTIVE LAW.

In the *Botsford* case, an action for personal injury tried in the Circuit Court of the United States in Indiana, this Court held that the Circuit Court was without power to order the plaintiff to submit to a surgical examination in advance of trial, but the Court did not hold that substantive rights were involved, as distinguished from procedure. On the contrary, the opinion deals with the point as if it were a procedural matter. The Court assumed that the power to make orders for physical examination may rest

1, on common law practice;

2, on acts of Congress authorizing it;

3, *on State practice adopted by Congress for the Federal Courts by the Conformity Act.*

It held (1) that there was no such practice at common law; (2) that there was no act of Congress authorizing it; (3) that the Conformity Act, Sec. 914 R. S., did not establish the practice in the Federal court in Indiana, first, because it did not satisfactorily appear that such a practice existed in the State courts,

and, second, because the Conformity Act should not be construed to transplant such a practice to the Federal courts, and so to construe it would raise a conflict with acts of Congress which expressly fixed the modes of proof in Federal courts.

The distinction between substantive law and procedure was not really involved, but the opinion plainly treats the question as one of procedure, regulated or affected by procedural statutes.

In the *Stetson* case the action was for damages for personal injuries. The situation differed from the *Botsford* case in that New Jersey where the case was tried had a statute clearly authorizing the State courts to make orders for physical examination. The Court said that no act of Congress regarding modes of proof prohibited orders for such examinations or the use of the testimony of the examining physician. (In this respect the opinion seems in conflict with that in the *Botsford* case and is probably right.) The opinion then states that there was a statute of the United States which made the New Jersey statute applicable in the Federal courts, and cited the rules of decision statute (Sec. 721 R. S.; Title 28 §725 U. S. C.), not the "Conformity" statute. (Sec. 914 R. S.; Title 28, §724 U. S. C.). The only thing in the *Stetson* decision to suggest that the Court considered the question one of substantive law is the reference to the rules of decision statute, instead of to the Conformity statute.

In contrast, the Court in the *Botsford* case treated the Conformity Act as the one having a bearing. Furthermore, in the *Stetson* case the Court did say that the matter was one to be regulated by act of Congress. If it were considered a matter of substantive law rather than procedure, that statement would

not have been made. *The fact is that the question whether physical examination involves substantive law or procedure was not involved in the Stetson case,* and a decision on that point was not necessary to a decision of the case, because the cause of action arose in New Jersey and the case was tried in a United States Circuit Court in that State. The decision is not authority for the proposition that requirement of a physical examination is a matter of substantive law.

Although in the two cases above discussed the Court indicates that a Federal statute was necessary to authorize a physical examination in a Federal court, it does not follow that the system may only be established by a statute.

When the *Botsford* and *Stetson* cases were decided, court-made codes of procedure were not in use. Procedural systems were common law or statutory, and as common law practice did not provide for physical examinations in the Federal courts, authorization of the practice required a statute, *i. e.*, an act of Congress installing it directly, or indirectly by adopting the State practice.

Here Rules 35 and 37, if procedural, have the effect of a statute. They are authorized by a statute which leaves rules of procedure to this Court, and provides that the rules adopted by it shall supersede existing statutes. The situation, legally, is precisely the same as if the Congress had adopted a code of procedure containing a provision identical with Rules 35 and 37.

These rules have been held valid in two other cases: *Countee* v. *United States,* 112 F. (2d) 447 (C. C. A. 7th Circuit), and *Beach* v. *Beach,* 114 F. (2d) 479 (U. S. C. A. Dist. of Columbia).

Those decisions give considerable weight to the fact that this Court, when it promulgated the rules,

presumably was of the opinion that they are valid. Any such conclusion was reached *ex parte*. In a justiciable case or controversy, it is obvious that the Court in the discharge of its constitutional functions must reexamine the question. It is proper enough for a lower court to assume that this Court would not have promulgated a rule it thought invalid, but that argument has no weight when a case reaches this Court. Those decisions also give weight to the fact that the Congress refrained from "vetoing" the rules. The conclusion that this non-action is equivalent to affirmative legislation approving the rules, is inadmissible. Yet it is fair to say that if the narrow interpretation of the enabling act urged by petitioner conforms to the intention of Congress, the law making body would not have allowed the rules to go into effect because so many of them would have appeared to go beyond this Court's power. Therefore, non-action by the legislative branch does tend to confirm the view that by the enabling act the Congress intended to leave to this Court the broadest power permitted by the Constitution.

The opinions in the *Botsford* and *Stetson* cases justify one further comment. They lay great stress on the sanctity of the person and the affront to modesty by physical examination. In his dissenting opinion in the *Botsford* case Mr. Justice Brewer said (pp. 258-259):

> "Mr. Justice Brown and myself dissent from the foregoing opinion. The silence of common law authorities upon the question in cases of this kind proves little or nothing. The number of actions to recover damages, in early days, was, compared with later times, limited; and very few

of those difficult questions as to the nature and extent of the injuries, which now form an important part of such litigations, were then presented to the courts. If an examination was asked, doubtless it was conceded without objection, as one of those matters the right to which was beyond dispute. Certainly the power of the courts and of the common law courts to compel a personal examination was, in many cases, often exercised, and unchallenged. Indeed, wherever the interests of justice seem to require such an examination, it was ordered. The instances of this are familiar; and in those instances the proceedings were, as a rule, adverse to the party whose examination was ordered. It would be strange that, if the power to order such an examination was conceded in proceedings adverse to the party ordered to submit thereto, it should be denied where the suit is by the party whose examination is sought. In this country the decisions of the highest courts of the various States are conflicting. This is the first time it has been presented to this court, and it is, therefore, an open question. There is here no inquiry as to the extent to which such an examination may be required, or the conditions under which it may be held, or the proper provisions against oppression or rudeness, nor any inquiry as to what the court may do for the purpose of enforcing its order. As the question is presented, it is only whether the court can make such an order.

The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded, and it is a matter of frequent occurrence, that in the trial of suits of this nature the plaintiff may make in the courtroom, in the presence of the

jury, any not indecent exposure of his person to show the extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose the actual facts to the jury if his interest require; but by this decision, if his interests are against such a disclosure, it cannot be compelled. It seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but when he testifies as to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him in the like interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases in the interests of justice, or from considerations of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?

It is not necessary, nor is it claimed, that the court has power to fine and imprison for disobedience of such an order. Disobedience to it is not a matter of contempt. It is an order like those requiring security for costs. The court never fines or imprisons for disobedience thereof. It simply dismisses the case, or stays the trial

until the security is given. So it seems to us that justice requires, and that the court has the power to order, that a party who voluntarily comes into court alleging personal injuries, and demanding damages therefor, should permit disinterested witnesses to see the nature and extent of those injuries in order that the jury may be informed thereof by other than the plaintiff and his friends; and that compliance with such an order may be enforced by staying the trial, or dismissing the case.

For these reasons we dissent."

Conditions have changed materially in the fifty and the forty years since the *Botsford* and *Stetson* cases were respectively decided. Medical and surgical sciences have immensely improved. It has become almost universal for those suffering from physical ailments to undergo complete clinical examinations as a basis for diagnosis. Millions of people subject themselves at frequent intervals to physical examinations as a precautionary measure. The conditions under which such examinations are now made by physicians and surgeons, assisted by trained nurses, have greatly improved. Plaintiffs in personal injury cases universally subject themselves to examinations by physicians of their own choosing. In most of the states, examinations made at the instance of adversary parties are allowed and rarely is it necessary to apply to a court for an order. We have become so accustomed to these practices that physical examinations conducted under proper conditions are taken for granted and are no affront to privacy or shock to modesty. The reasoning of Mr. Justice Brewer fifty years ago is infinitely more persuasive under present conditions.

III.

The Disposition To Be Made of This Case.

If the Court holds the rules invalid, doubtless its action would be to reverse the judgment on that ground.

On the other hand, if Rule 35 is held valid, a question arises as to the disposition of the case, because of the fact that the order of commitment for contempt is not authorized by Rule 37.

It would be unfortunate, not only for both parties to this cause, but from the standpoint of the public interest, to have the judgment reversed on the narrow ground that contempt proceedings are unauthorized, without a decision on the question of the validity of the rule authorizing physical examinations. The use of contempt proceedings as a means for enforcing obedience to the order for examination was not raised in the trial court or in the Court of Appeals and has not been made the subject of any assignment of error, or in any other way questioned in the petition for *certiorari*.

On the other hand, the petition does squarely raise the question as to the validity of the rule providing for physical examinations at the instance of an adversary, and doubtless the Court understood, when it granted the writ, that was the only question presented.

Under these conditions the Court, if it holds the rule valid, may affirm, ignoring the fact that the rule does not authorize commitment for contempt, but such a course may cause misunderstanding as to the propriety of contempt proceedings in such a case. In discussing the validity of the rule, the Court may

have occasion to refer to the fact that the rule does not authorize arrest or physical compulsion.

Two courses are open if the rules are held valid. Either

1. Affirm the judgment with the explanatory statement that Rule 37 does not authorize contempt proceedings, and that the affirmance should not be interpreted as approving such proceedings, but results from the fact that no error was assigned on the point and the petitioner has not desired to make the point; or

2. Hold the rules valid but order the judgment of commitment for contempt vacated on the ground that contempt proceedings are not authorized by Rule 37, without prejudice to resort by the respondent to other appropriate means of imposing on the petitioner the consequences of further refusal to obey the order for examination.

Respectfully submitted,

WILLIAM D. MITCHELL,
Amicus Curiae.

November, 1940.

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APPENDIX.

(Tentative Draft, Part Two; October 16, 1935
(Confidential—Not Published.

F. *Physical and Mental Examination of Persons.*

Rule 63. *Application and Order.* In any civil action at law or in equity, in which the physical or mental condition of a person residing in the United States is material to the question of rights, liabilities, damages or relief involved in said cause, either party shall be entitled, at any time, on application to the court in which the cause is pending, and on reasonable notice to the adverse party or his attorney of record, and to such person if he is not an adverse party, to an order for the examination of the physical or mental condition of such person, at such time and place, in such manner, by such persons, and under such conditions, as the court shall designate in such order.

H. *Penalties.*

Rule 65. *Powers of the Court.* (a) An attachment may be issued by the court against any person guilty of contempt of court in connection with the taking of any deposition either by oral examination or written interrogatories, or by reason of refusal to obey any order for inspection of documents or things or for the physical or mental examination of the person, whether or not such person is a party to the action.

(b) Where any party to the action is guilty of such contempt, the court may, in a proper case, in addition to, or in substitution for, such attachment, make an order (1) dismissing the action, or (2) striking out any pleading and rendering judgment in default of

such pleading, or (3) striking out any part of a pleading, or (4) denying a party the right to support or oppose any claim or defense with respect to which the examination or inspection was required, or to testify or offer evidence in regard thereto, or (5) requiring certain facts to be admitted for the purpose of the action, or (6) prohibiting the introduction in evidence of certain books, documents or things. or (7) staying further proceedings until the party shall have submitted to the examination desired; or (8) prescribing any other matter in the premises which justice may require.

Physical and Mental Examination of Persons

Rule 63—Application and Order

Mr. Mitchell. Rule 63—physical and mental examination of persons.

Mr. Wickersham. That includes not only parties but third persons.

Mr. Sunderland. Yes; it does.

Mr. Wickersham. And I was just wondering where we would get that. Here is an order for physical examination of a person who is not a party to the action.

Mr. Sunderland. That would be a very rare case, but the mental condition of such a person might be involved, because somebody might claim derivative title through an incompetent person.

Mr. Wickersham. Do you find that in any statutes?

Mr. Sunderland. As applied to one not a party?

Mr. Wickersham. One not a party.

Mr. Sunderland. I do not think so.

Mr. Mitchell. You cannot enforce against a third party. You cannot enforce it against a party to the action by compelling him to submit. The only penalty

you can put on him is a dismissal of his case, or presuming the fact to be true.

Mr. Lemann. Would not this be a contempt?

Mr. Mitchell. *You cannot force any man, under the Constitution, to exhibit his person; can you? He may lose his suit if he does not; but can you actually take the marshal and drag him in and put him in jail if he does not?*

Mr. Lemann. In the case where you require him to produce the automobile or some other thing which he considers his own business, if he does not do it, somebody thought it would be an unreasonable search and seizure to sentence him for contempt; did they not?

Mr. Sunderland. Yes.

Mr. Mitchell. Perhaps you are making a distinction between an automobile and a man.

Mr. Wickersham. A good many automobiles are worth more than some men.

Mr. Lemann. When the question is whether or not X is crazy, we would say, "We should like to examine X's father to see if he did not have some hereditary disease which might be likely to transmit itself and cause this insanity in X. Here, Mr. X's father: You come and submit yourself for examination." That is rather an obnoxious case.

Mr. Sunderland. Yesterday, when we spoke about things absurd on their face, I was thinking about this very item.

Mr. Wickersham. How often would you want to have a physical examination of somebody who was not a party to the action?

Mr. Sunderland. I do not know that you ever would.

Mr. Wickersham. I think it would be better to leave it out, because it will occur so very rarely.

Mr. Sunderland. And probably leave the other out on general principles.

Mr. Lemann. I think it would give fuel on which to attack.

Mr. Wickersham. I think you had better leave it out as applying to such person who is not an adverse party.

Mr. Dobie. There should be a provision for a reasonable showing there, too, I think.

Mr. Clark. Do you not want to put in aliens when you catch them here? This is unreasonable discrimination in favor of aliens.

Mr. Sunderland. This excludes witnesses entirely. This physical examination of parties works beautifully when it gets going. We have it in Michigan just as a matter of course. In every case, in the pre-trial docket, the judge says, "Whom do you want to make the physical examination?" The parties are both there. They name some doctor. "All right; that is the order."

Mr. Cherry. We do not even go to court about it.

Mr. Sunderland. They have to go to court on the pre-trial docket, but it is just a matter of course. It is a beautiful practice.

Mr. Dobie. I understand you are limiting this now to parties.

Mr. Sunderland. Yes.

Mr. Dobie. You want to put the reasonable showing in here, too; do you not think so—the same thing we had in the other?

Mr. Sunderland. Wherever the "physical or mental condition" of a party "is material to the question of rights, liabilities, damages," etc.—it is always material.

Mr. Dobie. You do not think that is necessary there?

Mr. Cherry. What about the penalty of dismissal of the action? Is not that commonly included in the sections?

Mr. Sunderland. I do not know just what you would show, except that it was material. You would have to show materiality to make the rule out of it.

Mr. Cherry. Suppose you get your order, and it is not complied with—the point the Chairman raised a while ago: Would it not be wise to state the penalty for failure to comply?

Mr. Wickersham. You mean in Rule 63?

Mr. Cherry. Yes. You have your order, and there is no compliance. The penalty is usually dismissal; is it not? After all, the United States Supreme Court held, before you had an equity rule on the thing, that you could not do this. That is the case of *Union Pacific Railway Company* vs. *Botsford*.

Mr. Dobie. They held that it could be done if there was a State statute.

Mr. Cherry. I say, without those things it could not be done. The purpose of it is for use in a suit.

Mr. Sunderland. I do not see what harm it would do to put that in.

Mr. Cherry. I should say that was the primary thing. If he does not want to press his suit, he is not in any contempt of court. If his suit is dismissed, that is the end of the matter.

Mr. Sunderland. Dismissal or default, as the case may be.

Mr. Cherry. Dismissal or default, because of course it might be the defendant.

* * * * * * * *

Mr. Mitchell. As far as defendant is concerned, would you not simply give the court power to take the fact involved against the defendant, whatever it was, or something of that kind?

Mr. Sunderland. There would not be any fact involved here. It is a question of physical examination.

Mr. Wickersham. But what is the theory of the physical examination? To find out the extent of the

injuries, for example, in a personal injury case; to find out a man's mental capacity in case that were involved. The physical capacity must be an important factor in the case before you can get an order to examine him.

Mr. Mitchell. Suppose it is the defendant and not the plaintiff? If it is the plaintiff who refuses to comply with the order, the remedy is by dismissal. If it is the defendant, instead of ordering judgment against him, if he refuses to comply with an order, you can just assume the fact against him.

For instance, if he is defending on the ground that he is mentally incompetent to do a thing—a case of a guardian ad litem, for instance, or something of that kind—or was incompetent at the time the thing occurred, a physical examination of him may be material to determine whether his defense is good. If he refuses to comply, the fact may be taken against him. That is not lack of due process; is it? It is equivalent to an admission by him.

Mr. Donworth. Would it not be well, for the sake of passing this, to agree as far as we can along the lines of the Chairman's suggestion—first, that this be confined to parties; second, that in the case of a plaintiff dismissal of the suit shall result; and that the Reporter shall make an investigation of how far we can go in the case of a defendant?

Mr. Mitchell. If there is no objection, that will be understood.

PENALTIES

RULE 65—POWERS OF THE COURT

* * * * * * * * *

Mr. Mitchell. Are we agreed that it is competent to declare a man in contempt for refusing to submit to a physical examination?

Mr. Sunderland. It is only a party now.

Mr. Lemann. I should think it would be a contempt.

Mr. Wickersham. You have that decision in *Union Pacific Railroad* vs. *Botsford*.

Mr. Mitchell. What did it say?

Mr. Wickersham (reading): "The single question presented by this record is whether, in a civil action for an injury to the person, the court, on application of the defendant, and in advance of the trial, may order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for. We concur with the Circuit Court in holding that it had no legal right or power to make and enforce such an order."

Mr. Lemann. Is that 141 U. S.?

Mr. Wickersham. That is 141 U. S. 250.

Mr. Mitchell. That is because there was no statute permitting that.

Mr. Wickersham. It goes on to say: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Mr. Lemann. But in a later case where there was a State statute they held that the Federal Court could require it to be done.

Mr. Mitchell. I suppose they can penalize a man civilly for not doing it by dismissing him or defaulting him. I raised the question in my own mind whether you could put him in jail. He could stand on his rights and lose his lawsuit, in other words.

Mr. Cherry. Is not that typically the provision of State statutes?

Mr. Mitchell. Contempt?

Mr. Cherry. No; the other—default, or losing the fact?

Mr. Mitchell. That is what I say.

Mr. Cherry. This examination goes only to that. If he loses the fact, or his case is dismissed——

Mr. Mitchell. Why put him in jail?

Mr. Cherry. You have a complete remedy for the thing.

Mr. Lemann. I do not think the judge would ever put him in jail, but the question is presented whether he would have the power to do it.

Mr. Cherry. Your contempt is to force a man to do it. That is one of the purposes of contempt. Why should you have any right to force him if he is out on the fact as to which it is material?

Mr. Wickersham. That is especially true because this question would arise almost always in connection with the examination of the defendant.

Mr. Mitchell. The plaintiff.

Mr. Cherry. Physical examination of the plaintiff.

Mr. Wickersham. The plaintiff—yes; that is right.

Mr. Mitchell. In nine hundred and ninety-nine cases out of a thousand it is physical examination of the plaintiff. In fact, I never heard of a case where it was desired to inspect a defendant.

Mr. Wickersham. That is quite true. You are quite right.

Mr. Lemann. This rule would still remain with fair general application if you put in the preceding rule the statement that the penalty should be merely dismissal of suit.

Mr. Mitchell. You would strike out of this section the words "or for the physical or mental examination of the person".

Mr. Lemann. What would that leave the penalty of a defendant who refused to submit himself for examination?

Mr. Mitchell. He would lose the fact, as Mr. Cherry says. The fact involved would be taken against him.

Mr. Lemann. That is provided here, but I guess it is simpler to put it in the preceding rule.

Mr. Mitchell. No; this only says where the party is guilty of such contempt, and unless you make it contempt this would not cover it; so you have to have the thing put in the other rule. But my question is whether, having now provided that failure to comply with order for physical examination shall result in dismissal of the suit of the plaintiff, or loss of the fact if it is a defendant, it is either necessary or safe to go a step further and say that he shall be put in jail, too.

Mr. Dobie. I doubt it, and I think a lot of them would be much more ready to approve the rule if you cut that out.

Mr. Mitchell. Why do we not strike out "or for the physical or mental examination of the person" in the contempt section?

Mr. Dobie. I think that is the answer. If we make him lose it as to that suit, the other man has no complaint.

Mr. Sunderland. It might be better to handle it in some other way than to interfere with this section as I have it.

Mr. Mitchell. It would not interfere with it, except to strike out punishment by contempt for failure to obey an order for physical or mental examination. The whole section relates to contempt.

Mr. Dobie. Just exclude that from the definition.

Mr. Sunderland. Yes; that is true. I get the point; but I think it may work out better to draft it a little differently.

Mr. Dobie. We will leave that to you.

Mr. Mitchell. Is there anything further in Rule 65?

Mr. Tolman. One suggestion, Mr. Chairman. A communication from one of the committees suggests that all penalties be united together in Rule 65, instead of having some special penalties in certain other rules. I just wondered whether Mr. Sunderland has considered that suggestion.

Mr. Sunderland. I did not get that question.

Mr. Tolman. There has been a suggestion made by the Ohio committee that all penalties and sanctions be gathered together and put in Rule 65, instead of being put repeatedly in other sections.

Mr. Sunderland. Yes; I thought that would be a good thing to do. That is the reason I said I might not want to strike this thing out of Rule 65, but adjust the other rules.

Mr. Mitchell. You understand that we agreed that the penalty for failure to comply with an order for physical examination should not be contempt?

Mr. Sunderland. Should not be contempt—yes.

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Rule 39. Consequences of Refusal to answer questions or give discovery. (a) Refusal by any party or witness to answer any question, if not made in good faith and with reasonable cause, may, where such party is under subpoena, be deemed a contempt of the court from which the subpoena issued, committed by the refusing party or witness or by the party or attorney advising such refusal, or by all of them.

(b) In case of the refusal of any party or witness to answer any questions, whether the deponent is under subpoena or not, the proponent of the questions may either complete the examination or immediately adjourn the same, and thereupon, on reasonable notice to the persons concerned, may apply to the court from which the subpoena issued, for an order compelling such answers, which order, if granted, shall also require that there be paid to the examining party, by the refusing party or witness or by the party or attorney advising such refusal, or all of them, as shall be just, the amount of the reasonable expense incurred by the examining party by reason of the

necessity for obtaining the order compelling such answers, including reasonable attorney fees. Such application or order shall not affect the liability of the party, witness, or attorney for contempt of court.

(c) Where a request has been served upon any party for a descriptive list of documents or things, no item which should have been, but is not, listed, and no item which is listed as one which the party is unwilling to permit to be inspected and copied or photographed, shall be admissible in evidence for any purpose at the instance of the party furnishing, or who should have furnished, the list, unless the court shall find that the party in so listing or failing to list acted in good faith and exercised reasonable diligence.

(d) Where a party unreasonably refuses to list documents or things, and thereby compels the other party to take depositions in order to obtain discovery in respect to their existence, location or custody, the party requesting such list shall be entitled, on application to the court, for an order requiring that the party so refusing shall pay to him the amount of the reasonable expense which he incurred by reason of the necessity for taking such deposition, including reasonable attorney fees.

(e) When an order is made that any party shall produce documents or things for inspection, copying or photographing, and it appears that the order was rendered necessary by the improper refusal of the party to permit such documents or things to be inspected, copied or photographed, such order shall require that there be paid by such party to the party obtaining the order, the amount of the reasonable expense incurred by the latter party by reason of the necessity for obtaining such order, including reasonable attorney fees.

(f) Where a party is requesfed, under the rules,

to admit the genuineness of any document or the truth of any fact, if such party or his attorney shall fail to serve such admission within the time fixed in such request, and if the party requesting the admission shall afterwards be required to establish the genuineness of any such documents or the truth of any such facts, and the same shall be proved or admitted, the party making such request may, on application to the court, obtain an order requiring the other party to pay to him the reasonable expense incurred by him in providing such proof, including reasonable attorney fees, unless it shall appear to the satisfaction of the court that there were good reasons for the refusal.

(g) Where an order has been made that any party or agent of a party shall answer designated questions, or shall produce designated documents or things for inspection, copying or photographing, or shall permit entry upon land for the purpose of inspecting the same, or shall submit to a physical or mental examination, and such party or agent shall refuse to obey such order, the court (1) may order that the matters regarding which the questions were asked, or that the character or description of such documents, things or land, or the contents of such documents, or that the physical or mental condition of such party, shall be deemed to be admitted, by the party so refusing, to be in accordance with the claim of the party obtaining such order; or (2) may by order deny the party the right to support or oppose any claim or defense with respect to which such discovery was required; or (3) may by order require certain facts to be admitted for the purpose of the action; or (4) may by order prohibit the introduction in evidence of certain documents or things or of certain testimony; or (5) may order a stay of further proceedings until the party or agent shall have satisfied the said order; or (6) may strike out any pleading or part thereof; or (7)

may dismiss the action or proceeding or any part thereof, with or without prejudice, or render judgment by default; or (8) may make two or more of the foregoing orders or may prescribe any other matter in the premises, which justice may require; and (9) the court may, in lieu of any of the foregoing orders, or in addition thereto, order the arrest of any party or agent of a party for disobeying any of such orders *except an order to submit to a physical or mental examination.* (Italics supplied.)